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IN THE

Supreme Court of the United States

October Term, 1981

MICHAEL KAYE,

Petitioner,

v.

LUCE, FORWARD, HAMILTON & SCRIPPS; and THEODORE W. GRAHAM,

Respondents.

SUPPLEMENTAL MEMORANDUM AND REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

	Page
SUPPLEMENTAL MEMORANDUM	1
REPLY BRIEF	
I. PUBLICATION OF THE DISTRICT COURT OPINION CALLING FOR PETITIONER'S DISBARMENT HAS PRODUCED SEVERE AND ENDURING COLLATERAL CONSEQUENCES WHICH ARE INCONSISTENT WITH MOOTNESS	1
II. THE FAIR NOTICE REQUIRED BY *ROADWAY EXPRESS* FOR IMPOSITION OF FEE SANCTIONS AGAINST COUNSEL SHOULD BE AT LEAST AS TIMELY AND INFORMATIVE AS THE NOTICE PRESCRIBED BY THE FEDERAL RULES OF CIVIL PROCEDURE TO APPRISE AFFECTED PARTIES OF A PENDING MOTION FOR SUMMARY JUDGMENT	4
CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 8

Babb v. Superior Court, 3 Cal.3d 841, 479 P.2d 379, 92 Cal.Rptr. 179 (1971) 9

Bishop v. Wood, 426 U.S. 341 (1976) 4

Canning v. Star Publishing Co., 19 F.R.D. 281 (D.Del. 1956) 7

Capital Films Corp. v. Charles Fries Productions, Inc., 628 F.2d 387 (5th Cir. 1980) 7

Church of Scientology of Hawaii v. United States, 485 F.2d 313 (9th Cir. 1973) 1

Connell v. Shoemaker, 555 F.2d 483 (5th Cir. 1977) 1

Consortium of Community Based Organizations v. Donovan, 530 F.Supp. 520 (E.D.Cal. 1982) 7

Crown Central Petroleum Corp. v. Waldman, 634 F.2d 127 (3d Cir. 1980) 7

Denton v. Mr. Swiss of Missouri, Inc., 564 F.2d 236 (8th Cir. 1977) 7

In re Marriage of Flaherty, 31 Cal.3d 637, 646 P.2d 179, 183 Cal.Rptr. 508 (1982) 1,3,4,5

Georgia Southern & Florida Ry. Co. v. Atlantic Coast Line R.R. Co., 373 F.2d 493 (5th Cir.), *cert. denied*, 389 U.S. 851 (1967) 7,8

Matter of Hailey, 621 F.2d 169 (5th Cir. 1980) 6

TABLE OF AUTHORITIES (Continued)

Page

CASES (Continued)

Hanson v. Polk County Land, Inc., 608 F.2d 129 (5th Cir. 1979) 6

Jones v. Menard, 559 F.2d 1282 (5th Cir. 1977) 7

Justin v. Jacobs, 449 F.2d 1017 (D.C.Cir. 1971) 1

Kibort v. Hampton, 538 F.2d 90 (5th Cir. 1976) 7

Macklin v. Butler, 553 F.2d 525 (7th Cir. 1977) 8

Estate of Merrill, 29 Cal.2d 520, 175 P.2d 819 (1946) ... 3

Metcalf v. Drew, 75 Cal.App.2d 711, 171 P.2d 488 (1946) 3

Monk v. Roadway Express, Inc., 73 F.R.D. 411 (W.D. La. 1977), *vacated*, 599 F.2d 1378 (5th Cir. 1979), *modified sub nom. Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980) 8

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 4

In re National Student Marketing Litigation, 445 F.Supp. 157 (D.D.C. 1978), 78 F.R.D. 726 (D.D.C. 1978), *aff'd sub nom. Lipsig v. National Student Marketing Corp.*, 663 F.2d 178 (D.C. Cir. 1980) 9

Nemeroff v. Abelson, 469 F.Supp. 630 (S.D.N.Y. 1979), *rev'd in part*, 620 F.2d 339 (2d Cir. 1980) 8

Paul v. Davis, 424 U.S. 693 (1976) 4

Penthouse International, Ltd. v. Playboy Enterprises, 663 F.2d 371 (2d Cir. 1981) 3,9

TABLE OF AUTHORITIES (Continued)

Page

CASES (Continued)

Pfister v. Delta Air Lines, Inc., 496 F.Supp. 932 (N.D. Ga. 1980) 9

Richards v. Gordon, 254 Cal.App.2d 735, 62 Cal.Rptr. 466 (1967) 3

Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980) ... 4,8,10

Robinson v. Ritchie, 646 F.2d 147 (4th Cir. 1981), *on remand*, 516 F.Supp. 437 (E.D. Va. 1981) 8,9

Sequoia Union High School District v. United States, 245 F.2d 227 (9th Cir. 1957) 6

Sharlitt v. Gorinstein, 535 F.2d 282 (5th Cir. 1976) 7

Matter of Shen, 7 Bankr. 942 (S.D. Cal. 1980) 1-2

Sibron v. State of New York, 392 U.S. 40 (1968) 1

Skinner v. White, 505 F.2d 685 (5th Cir. 1974) 2

Stone v. Olson, 588 F.2d 1316 (10th Cir. 1978) 7

United States v. Schrimsher, 493 F.2d 842 (5th Cir. 1974) 2

RULES

Federal Rules of Civil Procedure
Rule 6 6
Rule 56 5,6

TABLE OF AUTHORITIES (Continued)

Page

RULES (Continued)

Local Rules, U.S. District Court for the Southern District of California
Rule 220-6 6
Rule 265-1 6

SECONDARY AUTHORITIES

Stern, Robert L., and Eugene Gressman, *Supreme Court Practice* (5th ed. 1978)..... 3

SUPPLEMENTAL MEMORANDUM

On June 17, 1982, the California Supreme Court announced procedural standards for the imposition of fee sanctions against counsel who prosecute frivolous litigation. *See In re Marriage of Flaherty*, 31 Cal.3d 637, 645-654, 646 P.2d 179, 184-190, 183 Cal.Rptr. 508, 513-519 (1982).

The *Flaherty* case is pertinent to this petition for two reasons: (1) it reflects the broad contemporary importance of the fee sanction issues submitted here, and (2) it supplies the preliminary constitutional analysis which is otherwise missing from the record below due to the pretermission of procedural issues by the Ninth Circuit.

The issues in this case are timely, important, and ripe for review.

REPLY BRIEF

I

PUBLICATION OF THE DISTRICT COURT OPINION CALLING FOR PETITIONER'S DISBARMENT HAS PRODUCED SEVERE AND ENDURING COLLATERAL CONSEQUENCES WHICH ARE INCONSISTENT WITH MOOTNESS

A case cannot become moot so long as it continues to produce collateral consequences which have an adverse effect on any of the parties. The collateral consequences doctrine found its first expression in this Court in a criminal case. *Sibron v. State of New York*, 392 U.S. 40, 53-58 (1968). But the doctrine applies widely to civil litigation as well. *See, e.g., Connell v. Shoemaker*, 555 F.2d 483, 486-487 (5th Cir. 1977); *Church of Scientology of Hawaii v. United States*, 485 F.2d 313, 317-318 (9th Cir. 1973); *Justin v. Jacobs*, 449 F.2d 1017, 1019 (D.C. Cir. 1971).

The district judge in this case accused petitioner of unethical conduct "bordering on attempted fraud upon the Court." *Matter of Shen*, 7

Bankr. 942, 946 (S.D.Cal. 1980). He explicitly questioned petitioner's right and qualifications to practice law and officially recommended the initiation of disbarment proceedings. *Id.*, 7 Bankr. at 944, text accompanying footnote 2.

An accusation of "fraud on the Court" is a criminal contempt charge. *Skinner v. White*, 505 F.2d 685, 689 (5th Cir. 1974). Attempted fraud on the court would also be contumacious. And conduct "bordering on attempted fraud" is at least inferentially contemptuous if it deserves a punitive sanction of the magnitude imposed below — $36,339.29.

Criminal contempt convictions do not become moot just because the accused has completed his sentence of confinement or some third party has paid off a portion of the fine. A conviction for criminal contempt carries severe career consequences for an attorney. Those collateral consequences include the risk of disciplinary action by a bar association, foreclosure of opportunities for appointment to the bench or other high office, damage to professional reputation, and impairment to the attorney's ability to attract clients and to represent them effectively in open court. *United States v. Schrimsher*, 493 F.2d 842, 844 (5th Cir. 1974).

Even if this case were regarded as a strictly civil matter, the same collateral consequences principles would govern. The District Court certified its opinion for publication in the national reporter system and promptly alerted the local press. Petitioner first learned about the decision from widely circulated newspaper accounts, not from the Court.

The result for petitioner was immediate professional disgrace and economic ruin. Petitioner's law practice has been virtually destroyed, and the door has slammed shut on other employment opportunities except at a sub-professional level.

A published attack on an attorney's integrity and motives is a severe sanction which can have a devastating impact on his or her ability to

obtain employment and to function effectively within the judicial system. *In re Marriage of Flaherty*, 31 Cal.3d 637, 652, 646 P.2d 179, 189, 183 Cal.Rptr. 508, 518 (1982).

An official reprimand may disqualify an attorney for admission to practice in other courts. *See* R. Stern and E. Gressman, *Supreme Court Practice* § 19.3 at 913 (5th ed. 1978). And it is likely to provoke disciplinary action in courts where the accused attorney is already a member of the bar.

An attorney who suffers stigmatizing professional condemnation in a published opinion acquires independent standing to prosecute his own appeal whether or not he was made a party to the judgment. *See, e.g., Penthouse International, Ltd. v. Playboy Enterprises*, 663 F.2d 371, 373, 392 (2d Cir. 1981) (allowing intervention on appeal).

Whenever a judgment embraces findings of attorney misconduct, the attorney is entitled to appellate review on the merits. The case does not become moot even if a co-party pays the judgment in full. Otherwise the judgment would attain finality and expose the attorney to adverse collateral consequences without an opportunity to test the validity of the underlying adjudication. *Estate of Merrill*, 29 Cal.2d 520, 523-525, 175 P.2d 819, 821-822 (1946).

The District Court's disbarment recommendation is still pending. Petitioner's former clients could also bring an action for legal malpractice if they so choose. In either event, if the District Court findings attain finality, those findings could operate with collateral estoppel effect to prevent relitigation of any matter decided below. *See Richards v. Gordon*, 254 Cal.App.2d 735, 738-739, 62 Cal.Rptr. 466, 468-469 (1967) (doctrine of issue preclusion applies to disciplinary proceedings); *Metcalf v. Drew*, 75 Cal.App.2d 711, 719-722, 171 P.2d 488, 493-495 (1946) (finality of civil fraud judgment would preclude defense on the merits against disciplinary action to revoke a professional broker's license).

The interests at stake here are not *de minimis*. This case is distinguishable from *Bishop v. Wood*, 426 U.S. 341, 348-349 (1976), because the official defamation here has been widely published. The case is also distinguishable from *Paul v. Davis*, 424 U.S. 693, 705-706 (1976), in that the official charges have virtually destroyed petitioner's livelihood.

Petitioner has a protected liberty and property interest in the outcome. Fundamental fairness requires that an attorney be permitted to defend himself publicly against official charges which threaten to stain his personal and professional future. *In re Marriage of Flaherty, supra*, 31 Cal.3d at 652-653, 646 P.2d at 189, 183 Cal.Rptr. at 518 (1982).

A Ninth Circuit motion panel deliberated over extensive briefs and concluded that Luce Forward's mootness contentions were without merit. [*See* Petition at Appendix 2]. There has been no change of facts since that date to warrant a different result.

II

THE FAIR NOTICE REQUIRED BY *ROADWAY EXPRESS* FOR IMPOSITION OF FEE SANCTIONS AGAINST COUNSEL SHOULD BE AT LEAST AS TIMELY AND INFORMATIVE AS THE NOTICE PRESCRIBED BY THE FEDERAL RULES OF CIVIL PROCEDURE TO APPRISE AFFECTED PARTIES OF A PENDING MOTION FOR SUMMARY JUDGMENT

"Due process is a flexible concept, and must be tailored to the requirements of each particular situation." *In re Marriage of Flaherty*, 31 Cal.3d 637, 654, 646 P.2d 179, 190, 183 Cal.Rptr. 508, 519 (1982). At a minimum, however, due process requires that any significant deprivation of liberty or property by adjudication "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

The District Court announced its official recommendation for disbarment proceedings against petitioner in a scathing opinion which it certified for publication. That published criticism was itself a "severe sanction." *In re Marriage of Flaherty, supra*, 31 Cal.3d at 652, 646 P.2d at 189, 183 Cal.Rptr. at 518. A high order of procedure was therefore appropriate to the nature of the case.

The Court also imposed a cost and fee sanction against petitioner in the amount of $36,339.29. That fee penalty was equivalent to a summary judgment for the tort of malicious prosecution or abuse of process. At a minimum, the sanction procedure should have conformed to the notice standards for summary judgment under Rule 56, F.R.Civ.P.

But petitioner received neither notice nor opportunity to be heard on the sanction issue. There was no trial. There was no sanction hearing. There was no notice. Luce Forward moved orally for sanctions at a hearing calendared and noticed for a different purpose. It delayed its motion and held back its supporting affidavits until after petitioner had used up his full allowance of time and had no opportunity to respond.

Luce Forward insists that its intentions were "quite clear" and that the abbreviated sanction procedure in this case satisfies all the requisites of due process. [Opposition Brief at 19 et seq.]

But Luce Forward never filed or served a written motion or cross-motion for sanctions. It never applied for an order to show cause on the sanction issue. It never gave advance notice in writing or otherwise that it intended to piggy-back a sanction motion onto the July 7, 1980 hearing of the Shens' motion to reopen their case.

On the contrary, Luce Forward's attorneys carefully concealed their "quite clear" intentions by falsely representing that they would request a fee award "according to the bill-of-costs procedure." [*See* 1 *Excerpt of Record* 129, 165:21-22.]

No one is entitled to apply for costs under the bill of costs procedure before attaining the status of prevailing party. Rule 265-1 of the Local Rules of the U.S. District Court for the Southern District of California permits application for costs only "after the making of an order for judgment or decree." Even then, a prevailing party must serve and file a verified and itemized cost bill and must give advance written notice of the date and hour when the application will be made. Luce Forward complied with none of those requirements.

Even the most routine motions must be submitted in writing with service of notice at least five days before the date and hour specified for the hearing. Rule 6(d), F.R.Civ.P. Summary judgment motions require advance notice of at least ten days. Rule 56(c), F.R.Civ.P. And the advance notice requirement increases to 17 days under Local Rule 220-6 of the U.S. District Court for the Southern District of California. Luce Forward casually disregarded all of those notice standards.

Luce Forward's "quite clear" intentions were certainly not clear to the District Court. The court issued its own notice of hearing after it recalendared the Shen motion. That official notice made no mention of any pending cross-motion for fee sanctions. [*See* 6 *Excerpt of Record* 1742.] At the outset of the July 7, 1980 hearing, both the clerk of court and the district judge announced that the purpose of the proceeding was to hear the Shen motion to reopen. They did not even hint that any request for fee sanctions was on the docket. [R.T. 3:1-14 (July 7, 1980).]

Petitioner had no reason to anticipate that fee sanction issues would come up at the July 7, 1980 hearing. The Ninth Circuit does not permit oral motions for summary judgment. *Sequoia Union High School District v. United States*, 245 F.2d 227, 228 (9th Cir. 1957). *Accord, Matter of Hailey*, 621 F.2d 169, 171-172 (5th Cir. 1980); *Hanson v. Polk County Land, Inc.*, 608 F.2d 129, 131 (5th Cir. 1979). No court should permit unnoticed oral motions for fee sanctions in excess of $36,000 where genuine issues of material fact are in dispute.

Luce Forward's oral motion for sanctions failed to give the fair notice required by due process. On the other hand, if the sanction motion actually originated somewhere in Luce Forward's massive opposition papers, it was defective for three reasons.

In the first place, written opposition to a motion does not in itself constitute a cross-motion for affirmative relief. *Denton v. Mr. Swiss of Missouri, Inc.*, 564 F.2d 236, 241 at text accompanying footnote 8 (8th Cir. 1977).

In the second place, even if Luce Forward's opposition papers could be construed as some kind of countermotion, that purported countermotion would be ineffective for any purpose until Luce Forward served and filed a notice of motion in strict compliance with the rules of procedure. *See Consortium of Community Based Organizations v. Donovan*, 530 F.Supp. 520, 541 (E.D.Cal. 1982). A notice of motion must specify a definite date on which the motion will be heard and taken under advisement. *Capital Films Corp. v. Charles Fries Productions, Inc.*, 628 F.2d 387, 392 (5th Cir. 1980); *Kibort v. Hampton*, 538 F.2d 90, 91 (5th Cir. 1976). Luce Forward never served or filed any such notice of motion.

The fact that one party has already given notice of hearing on a motion of its own does not excuse the adverse party from serving a timely cross-notice if it intends to pursue different relief on a different claim at the same hearing. *See, e.g., Crown Central Petroleum Corp. v. Waldman*, 634 F.2d 127, 128-129 (3d Cir. 1980); *Sharlitt v. Gorinstein*, 535 F.2d 282, 283-284 (5th Cir. 1976); *Georgia Southern & Florida Ry. Co. v. Atlantic Coast Line R.R. Co.*, 373 F.2d 493, 495-498 (5th Cir.), *cert. denied*, 389 U.S. 851 (1967).

In the third place, affidavits in support of a motion must be served with the motion. *Stone v. Olson*, 588 F.2d 1316, 1321 (10th Cir. 1978); *Jones v. Menard*, 559 F.2d 1282, 1285 at final paragraph of footnote 5 (5th Cir. 1977); *Canning v. Star Publishing Co.*, 19 F.R.D. 281, 283-284 (D.Del. 1956). Luce Forward carefully held back its fee affidavits to

spring as a surprise without notice at the July 7, 1980 hearing. [R.T. 23:15 - 25:4 (July 7, 1980).]

If the sanction motion originated at the hearing, it was defective for lack of fair notice. If the motion originated prior to the hearing, then its major supporting affidavits were untimely served and filed. In either event, Luce Forward relied on sharp practices to catch petitioner by surprise and to prevent effective response.

The federal rules do not authorize "disposition by surprise." *Macklin v. Butler*, 553 F.2d 525, 530 (7th Cir. 1977). Summary dispositions should not be accomplished "by an unforeseeable thrust with no chance to parry." *Georgia Southern & Florida Ry. Co. v. Atlantic Coast Line R.R. Co., supra*, 373 F.2d at 498.

Luce Forward could have made its intentions "quite clear" by the conventional expedient of complying with prescribed procedure. It could have served and filed an explicit motion for sanctions, attached its fee affidavits, reserved a hearing date, and given formal notice of the motion hearing. Instead, it deceived and lulled petitioner by falsely announcing that it would proceed through a bill-of-costs procedure after judgment.

Besides lack of fair notice, there is a further reason why petitioner could not reasonably have foreseen that sanction issues would come up before entry of judgment on the merits. Anglo-American courts have traditionally postponed the assessment of attorney fees and costs until litigation of the substantive claims has terminated. *See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 fn. 18 (1975).

The leading fee sanction cases have generally followed that tradition. *See, e.g., Monk v. Roadway Express, Inc.*, 73 F.R.D. 411, 412-413 (W.D. La. 1977), *vacated on other grounds*, 599 F.2d 1378, 1380-1381 (5th Cir. 1979), *modified in part sub nom. Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980); *Robinson v. Ritchie*, 646 F.2d 147, 148 at text accompanying footnote 2 (4th Cir. 1981); *Nemeroff v. Abelson*, 469 F.Supp. 630, 632 (S.D.N.Y. 1979), *rev'd in part on other grounds*, 620

F.2d 339 (2d Cir. 1980); and *In re National Student Marketing Litigation*, 445 F.Supp. 157 (D.D.C. Jan. 9, 1978) (dismissing counterclaim), 78 F.R.D. 726, 727-728 (D.D.C. July 26, 1978) (imposing sanctions), *aff'd sub nom. Lipsig v. National Student Marketing Corp.*, 663 F.2d 178 (D.C. Cir. 1980).

Sanctions are occasionally imposed while a case is still in progress. But it takes a formal written motion to activate the sanction procedure. The court must conduct an evidentiary hearing. And the sanction hearing is almost invariably severed from any adjudication of the merits of the case in chief. *See, e.g., Pfister v. Delta Air Lines, Inc.*, 496 F.Supp. 932 (N.D. Ga. 1980).

It is essential to bifurcate and postpone sanction proceedings pending disposition of the merits in order to avoid driving an automatic wedge between attorney and client. Otherwise, any party could always force the immediate disqualification of its opposing counsel by alleging bad faith and demanding sanctions from attorney and client alike on a theory of joint and several liability. *See, e.g., Penthouse International, Ltd. v. Playboy Enterprises*, 663 F.2d 371, 373, 392 (2d Cir. 1981) (recognizing conflict of interest between attorney and client and remanding to determine who should pay the sanction assessment); *Robinson v. Ritchie, supra*, 646 F.2d at 148-149, *on remand*, 516 F.Supp. 437, 439-440 (E.D. Va. 1981) (sanction procedure drives a wedge between attorney and client, requiring the attorney's disqualification); and *Babb v. Superior Court*, 3 Cal.3d 841, 847-848, 479 P.2d 379, 382, 92 Cal.Rptr. 179, 182 (1971) (counterclaim for malicious prosecution, if allowed, would place attorney in a potentially adverse relation to his client).

Luce Forward trapped petitioner in a procedural ambush by concealing its "quite clear" intentions from everyone but itself. Lack of notice caught petitioner unprepared. His allotment of time had already been used up before Luce Forward even broached the sanction issue. And ethical imperatives dictated silence because petitioner's self-interest

in avoiding personal sanctions was in potential conflict with his duty to protect the Shens against fee liability.

Luce Forward procured the sanction award by sharp practices without fair notice or hearing.

CONCLUSION

Luce Forward has devoted much effort to depicting petitioner as an unmitigated rogue who does not deserve fair procedure. The misrepresentations, distortions, and half-truths which it has resorted to in service of that end are too numerous and complex to meet effectively in the restricted space of this reply.

Most of the personal disparagements aimed at petitioner have little or no bearing on the issues actually submitted and were interjected here, as in the courts below, only for their prejudicial and distractive impact.

Scoundrels no less than saints are entitled to due process, and alleged scoundrels have perhaps the greater need. The material fact disputes in this case should have been resolved by trial, not by abbreviated procedure.

Roadway Express was a milestone in this Court's treatment of bad faith litigation. But it was not the last word. The establishment of adequate procedural safeguards is essential to make sure that legitimate advocacy is neither chilled nor punished in the effort to deter real abuses. The issues submitted in this case are of sufficient general importance to warrant review. The petition should be granted.

Respectfully submitted,

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